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IN THE

Supreme Court of the United States

REX R. SPRIETSMA, AS ADMINISTRATOR OF THE ESTATE OF JEANNE SPRIETSMA, DECEASED,

Petitioner,

v.

MERCURY MARINE, A DIVISION OF BRUNSWICK CORPORATION,

Respondent.

On Writ Of Certiorari to the Supreme Court Of Illinois

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of this *amicus curiae* brief have been filed with this Court.[1]

ATLA is a voluntary national bar association whose approximately 50,000 lawyers primarily represent injured plaintiffs in civil actions. The Admiralty Law Section of the Association includes most of the attorneys who specialize in representing plaintiffs in maritime personal injury litigation.

State law has traditionally afforded a remedy in tort by which victims may seek fair compensation from manufacturers of dangerous products. Federal maritime common law has also developed strict liability principles which apply to injuries caused by defective or unreasonably dangerous products. Increasingly, defendants in tort actions seek refuge in the doctrine of federal pre-emption. In too many instances, immunity from common law tort law is urged by those whose real objective is immunity from any accountability. Where Congress has not provided for meaningful alternative regulation and remedies, pre-emption would result in failure of government in one of the most fundamental obligations to its citizens -

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1 Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

- the right to legal recourse for injury. One of the tenets of ATLA's mission is to preserve the right of access to justice.

Our brief will be limited to the question whether the Federal Boat Safety Act preempts state or maritime causes of action contending that a pleasure motor boat was defectively designed, without particular reference to the facts in this case.

SUMMARY OF THE ARGUMENT

The Supreme Court of Illinois erred in finding pre-emption of the Petitioner's common law product liability claim, contrary to the plain statement of Congressional intent found in the words of the Federal Boat Safety Act. In so doing, the Illinois court misconstrued the several recent decisions of this Court setting out the proper standards for determining federal pre-emption.

In this case, and in many others, manufacturers and others subject to federal safety regulations assert pre-emption as a shield against product liability suits. Their argument is that tort causes of action are simply another form of regulation. Therefore, they contend, the plain meaning of express pre-emption of state regulation, requirements, or standards also encompasses tort remedies.

To the contrary, tort liability differs dramatically from administrative regulation and serves other important interests. Congress cannot therefore be presumed to intend pre-emption of state legislative and administrative regulation to include tort remedies unless Congress has made its intent explicit and unambiguous.

Courts have long viewed tort liability as not inconsistent with federal regulation, characterizing such regulations as establishing a floor, but not a ceiling, on the duty to market safe products. Tort causes of action provide legal redress for injury, a fundamental right afforded by state law. It is unlikely that Congress would intend the drastic restriction of the right to seek compensation for injuries without clear indication that it so intends.

Although both product liability and administrative safety regulations seek to promote the safety of products, tort liability does so without direct government action. Rather, by requiring manufacturers to bear the cost of harms caused by unreasonably dangerous products, the tort system leaves decisions regarding safety to private parties responding to market forces. This Court has recognized that the indirect incentives for safety stemming from potential tort liability are not the type of direct state mandates that Congress generally seeks to pre-empt. The court below erred in finding that products liability actions were impliedly pre-empted as an "obstacle" to the objective of Congress. Courts exceed their own authority when they seek out "implied" pre-emption in the face of express provisions in the statute that provide a "reasonable indicium" of congressional intent.

Finally, the cause of action for wrongful death available to the Petitioner is afforded under the federal maritime common law. This Court and all of the federal courts have recognized a maritime common law cause of action in strict liability for injury caused by defective and unreasonably dangerous products under Restatement of Torts (Second) § 402A. This federal common law cause of action clearly is not pre-empted

by the FBSA provision prohibiting state "laws" or "regulations". The failure of the Coast Guard to actually regulate to the extent of its authority does not pre-empt other laws by implication.

ARGUMENT

I. INTRODUCTION

Congress enacted the Federal Boat Safety Act of 1971, 46 U.S.C. § 4301-4311 ["FBSA"] in response to the dismaying number of accidents associated with recreational boating. S. Rep. No. 248, 92d Cong., 1st Sess. 6 (1971). Among the injuries and fatalities cited by the Senate Committee on Commerce were 58 persons struck by boats or propellers in 1970 alone. *Id.* at 10.

The FBSA was designed "to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public". S. Rep. 92-248, reprinted in 1971 U.S.C.C.A.N. 1333. The statute authorized the Secretary of Transportation ". . . to prescribe regulations . . . establishing **minimum safety standards** for recreational vessels and associated equipment. . . ." 46 U.S.C. § 4302(a) (emphasis added). The Secretary has delegated the regulatory authority to the Commandant of the United States Coast Guard. Sections 4302(b) and (c) set forth procedures that must be followed to prescribe such regulations, including consultation with the National Boating Safety Counsel. The Coast Guard must also comply with the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553.

On February 1, 1990, The U.S. Coast Guard announced that it would "take no regulatory action to require propeller guards." The Coast Guard stated it

would continue to collect and review information. *Id.*, 757 N.E.2d at 78.

As discussed at length by Mr. Sprietsma in his Petition for Certiorari, the decision by the Coast Guard not to begin the regulatory process with respect to propeller guards in 1990, did not constitute a formal rule making proceeding, and did not result in any regulatory action. The Coast Guard did not attempt to undertake the notice-and-comment rule making requirements of the Administrative Procedure Act, 5 U.S.C. Section 553. As of this date, there is still no federal regulation with respect to propeller guards, either requiring or prohibiting their use by federal law. However, since that original decision not to issue regulations, the Coast Guard has in fact opened the rule making process. In 1995 the Coast Guard issued an Advance Notice of Proposed Rule making requesting public comment on the use of propeller guards on houseboats. In 1996, the Coast Guard issued another ANPRM to seek information about injuries involving propeller strikes and rented boats. In 1997, the Coast Guard sought public comment on boating accidents involving rented powerboats in which people have been injured by the propeller. The Coast Guard has extended the period for comments and is still considering whether specific federal regulations are appropriate. Petition, pp. 5-7.

The FBSA contains a specific pre-emption provision in 46 U.S.C. § 4306:

> [A] State . . . may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is

> not identical to a regulation prescribed under Section 4302 of this title.

The statute also has a plainly stated savings clause in 46 U.S.C. § 4311(g):

> Compliance with this chapter or standards, regulations or orders prescribed under this chapter does not relieve a person from liability at common law or under state law.

The accident which is the basis of this suit occurred when the decedent, Jeanne Sprietsma, fell from a motor boat and was struck by the blades of the propeller, which caused serious injuries resulting in her death. The petitioner filed a wrongful death action against Mercury Marine in the Circuit Court of Cooke County, Illinois. The complaint alleged that the boat engine was defective in design and unreasonably dangerous because it was not equipped with a propeller guard. The trial court granted a motion to dismiss the complaint, finding that the claim was pre-empted by the Federal Boat Safety Act and the Coast Guard decision to take no regulatory action to require propeller guards.

In the appeal below, the Supreme Court of Illinois correctly held that the FBSA does not expressly pre-empt the cause of action asserted in this complaint because of the clearly stated savings clause in Section 4311(g). The Illinois Court correctly found itself bound by the decision of this court in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), noting that this Court stated: ". . . that the inclusion of a savings clause prohibits a broad reading of the express pre-emption provision." The court noted that the presence of a savings clause "assumes that there are some significant

number of common law liability cases to save. . . . We agree that section 4311 limits section 4306. Consequently, we find no express pre-emption." *Id.* 757 N.E. 2d at 80-83.

However, Amicus submits that the Illinois court erred in finding implied conflict pre-emption of Mr. Sprietsma's common law remedy, in the face of clearly stated congressional intent to the contrary. The Illinois court recognized that this Court has found implied conflict pre-emption where it is ". . . impossible for a private party to comply with both state and federal requirements . . .", or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress.. . ." *Id.* at 82 (citations omitted). The court then also recognized the task before it:

> Since it is not impossible for a manufacturer to comply with a state common law rule requiring propeller guards, and the Coast Guard's decision not to require them, we will address whether a state common law tort claim based on failure to install the guards stands as an obstacle to the accomplishment of the purposes and objectives congress sought to achieve in enacting the FBSA. *Id.* at 82.

However, Amicus submits that the Illinois Court missed the point when it became entangled in the question of "regulatory uniformity," and thus completely overlooked the primary objective of Congress in passing the Federal Boat Safety Act, which was ". . . to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public. . . ." S. Rep. Nos. 92-248 (1971) .

We urge the Court to hold that the Illinois Court, in finding implied pre-emption in this case, failed to correctly apply the principles for determining federal pre-emption set forth in the decisions of this court in *Cipollone v. Liggett Group, Inc.* , 505 U.S. 504 (1992); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Medtronic , Inc. v. Lohr*, 518 U.S. 470 (1996) and *Geier v. American Honda Motor Co., supra,* as correctly set out in length in the Petition and discussed in a different context below. In particular, the Illinois court failed to recognize the difference between the Coast Guard's decision not to regulate under the FBSA and the regulations involved in *Geier*, which set forth in detail the variety and mix of devices permitted and the gradual passive restraint phase-in that were deliberately imposed by the Department of Transportation in Federal Motor Vehicle Safety Standard 208.

This Amicus agrees with the Petitioner that the Illinois Court erred in affording pre-emptive effect to the Coast Guard's regulatory inaction, discussed at length in the Petition for Writ of Certiorari at pp. 15-20. The Illinois Court also erred in failing to assign appropriate weight to the United States' own interpretation of the effect of the Coast Guard action on propeller guard, where the brief of the Solicitor General as Amicus Curiae in *Lewis v. Brunswick Corporation, supra,* was made a part of the record in the lower court proceedings in this case. Petition at pp. 23-25.

Amicus further submits that the Illinois Court erred in equating a damage award to the plaintiff in this product liability tort case to a state statute or

regulation requiring specific action by boat manufacturers.

Finally, the Illinois Court clearly erred in failing to recognize that Mr. Sprietsma's cause of action for the death of his wife is governed by federal maritime common law, a remedy which clearly is not pre-empted by the provision in this statute prohibiting the adoption of state statutes or regulations.

II. CONGRESSIONAL INTENT TO PRE-EMPT STATE POSITIVE LAW OR REGULATION DOES NOT ORDINARILY EXTEND TO PRE-EMPTION OF PRODUCT LIABILITY ACTIONS IN THE ABSENCE OF A PLAIN STATEMENT OF INTENT TO DO SO.

The notion that administrative regulation and common law liability are so similar that congressional intent to pre-empt the former naturally encompasses intent to pre-empt the latter lies at the heart of many lower court decisions finding pre-emption of tort remedies. Amicus suggests that this proposition misapprehends the nature of tort law, particularly product liability law, and its relationship to government regulation.

The ultimate goal in any pre-emption analysis is to determine the intent of Congress. In the FSBA, Congress has expressly prohibited the states from adopting laws or regulations which require safety standards or equipment which are not identical to regulations promulgated under the statute. However, Congress also expressly saved common law tort remedies, providing that compliance with the statute and ordinances prescribed under it "does not relieve a person from liability under common law or state law."

If Congress intended to pre-empt common law tort lawsuits, should it have not clearly so stated in the pre-emption clause where it prohibited states from adopting "a law or regulation" inconsistent with the statute? This is the central question presented in this case and in a great number of cases arising in the lower courts where regulated industries assert federal pre-emption as an immunity from product liability actions under state law. Indeed, it is a question this Court has asked. *Cipollone v. Liggett Group, Inc.*, No. 90-1038, Transcript of Oral Argument at 12-14, 18-19 (Oct. 8, 1991).

The Court addressed this question in plurality opinions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and *Medtronic, Inc. v. Lohr*, 518 U.S.470 (1996). Although the Court there set out the proper pre-emption analysis, the path is perhaps not well lighted. Amicus urges the Court to address this important issue here.

Concern for safety has prompted Congress to authorize a number of federal administrative agencies to promulgate standards or requirements related to product safety. Frequently, such legislation expressly pre-empts state regulation, requirements, standards, or laws. *E.g,*. National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1392(d); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136v; Federal Flammable Fabrics Act, 15 U.S.C. § 1203; Federal Hazardous Substances Act, 15 U.S.C. § 1261, note (b)(1)(A); Federal Food, Drug and Cosmetics Act Medical Device Amendments of 1976, 21 U.S.C. § 360k(a). Unquestionably, Congress intended to avoid subjecting regulated industries to a multiplicity of state

legislative or administrative requirements. In some of these acts, neither the text of the statute nor the legislative history indicates that Congress gave substantial thought to eliminating common law remedies.

Federal pre-emption of state law was not intended by the drafters of the Supremacy Clause to be a problem, but a solution to potential conflicts between the national government and state government, each exercising sovereign power over its citizens. *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976). This Court has consistently held that pre-emption occurs only where Congress, explicitly or impliedly, so intends. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987)(congressional intent is the "ultimate touchstone" for pre-emption). The judiciary's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987).

It would not be unreasonable for the Court to require that if Congress truly intends to restrict common law remedies, it do so in explicit and unambiguous language. After all, "Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires." *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 (11th Cir. 1989) *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1305 (4th Cir. 1993)("Congress has not failed to make such pre-emption clear when it desires to do so.").

A "plain statement" rule instructing courts to find pre-emption of state common law causes of action only where Congress has explicitly referred to them would serve to protect the role of the states in our federalist system and would prevent courts from exceeding their

judicial authority. "Application of the plain statement rule thus may avoid a potential constitutional problem." *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2403 (1991).

The strong presumption against pre-emption thus safeguards state autonomy. Laurence H. Tribe, *American Constitutional Law* § 6-25, at 479-80 (2d ed. 1988), quoted in *Gregory*, supra; Barbara A. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 Buff. L. Rev. 181, 182 (1991); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 Hastings Const. L.Q. 69, 112 (1988)("The courts can, however, simultaneously protect the political safeguards of federalism and afford the necessary deference to Congress by requiring that Congress speak clearly and explicitly whenever it pre-empts state legislation.")

At the same time, as Judge Kenneth Starr has observed, the "plain statement" rule also preserves the proper role of the judicial branch. "When judges preempt state laws in the absence of explicit congressional guidance, they in effect assume a legislative role without accepting legislative responsibility." Kenneth Starr, et al., *The Law of Preemption: A Report of the Appellate Judges Conference of the American Bar Association*, at p. 48 (1991).

Nevertheless, the Illinois court and several federal courts have "discovered" an express or implied Congressional intent to eliminate product liability actions based solely on the express pre-emption of state law, regulation, requirements or standards. Under this view, the plain meaning of the statutory language includes all regulation, both by positive law and by common law remedies. See *Lewis v. Brunswick Corp.*,107

F.3d 1494,1501(11th Cir.1997); Robert S. Adler and Richard A. Mann, *Preemption and Medical Devices: The Courts Run Amok*, 59 Mo. L. Rev. 895, 941 (1994).

III. ADMINISTRATIVE REGULATION AND TORT LIABILITY ARE FUNDAMENTALLY DIFFERENT AND THE COURT SHOULD PRESUME THAT CONGRESS INTENDED TO PRESERVE THIS TWO-PRONGED MEANS OF PROMOTING SAFETY IN THE WORDING IT CHOSE FOR THE FEDERAL BOAT SAFETY ACT.

Amicus submits that such a presumption in favor of pre-emption of state common law actions misapprehends the purpose and function of tort law. Administrative regulation and tort liability are fundamentally different. Indeed, each relies on the strengths of the other in a complementary fashion to protect the health and safety of Americans. Federal lawmakers understand this relationship and when Congress replaces state regulators with federal regulators, it does not ordinarily intend to close the doors of state courthouses as well.

Why would Congress not intend its pre-emption of state regulation to include common law damage actions? The answer lies in the fact that tort liability exerts its influence in a manner that does not pose the same potential for conflict with federal regulations as state positive law. Additionally, tort remedies serve important other interests not addressed by administrative regulation. Congress may be presumed to intend state common law remedies to continue along side a federal administrative scheme since the two have historically been viewed as complements of each other.

Modern product liability law is frequently traced to the landmark decision by Justice Brandeis in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). Its most prominent formulation is set forth in Restatement (Second) of Torts § 402A (1965), which has been substantially adopted by at least 36 states. CCH Products Liability Reporter ¶1570 (1993). Its purpose is to provide compensation for harms caused by unreasonably dangerous products and to deter manufacturers from marketing products in a defective, unreasonably dangerous condition. *See* John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973).

Many federal safety regulations are also aimed at ensuring the safety of products entering the marketplace. However, administrative regulation differs from tort liability in so many areas that the plain meaning of "regulation" could not naturally encompass both. Indeed, they are often viewed as polar opposites, which nonetheless complement each other. *See* American Law Institute, Reporters' Study: Enterprise Responsibility For Personal Injury vol I, 47-49 (1991); Teresa M. Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 12 J. Prod. Liab. 305 (1989); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Studies 357 (1984).

In *Cipollone*, the Court emphasized "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." 505 U.S. at 518. Indeed, federal safety regulation and state tort liability have coexisted for decades. It is a widely accepted principle of tort law that "Compliance with a

legislative enactment or an administrative regulation does not prevent a finding of negligence when a reasonable person would take additional precautions." Restatement (Second) of Torts §288(C)(1965).

Based on this principle, courts have harmonized product liability with federal regulatory standards by viewing the latter as "a floor, not a ceiling." *See Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542-43 (D.C. Cir. 1984); *Raymond v. Riegel Textile Corp*, 484 F.2d 1025 (1st Cir. 1973); *Larsen v. General Motors Corp.*, 391 F.2d 495, 506 (8th Cir. 1968)("National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability."). Previously, this was the position of the Eleventh Circuit with respect to the FBSA. *Elliott v. Brunswick Corp.*, 903 F.2d 1505, 1508 (11th Cir.1990)("a manufacturer's proof of compliance with either industry-wide practices, or even federal regulations, fails to eliminate conclusively its liability for its design of allegedly defective products.").

This Court assumes that members of Congress are familiar with common law principles or ordinary tort litigation. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 67 (1989). Therefore, this Court should presume that Congress intended to preserve this two-pronged means of promoting safety in the wording it chose for the Federal Boat Safety Act.

Congress is also unlikely to deem tort liability as equivalent to state administrative regulation for pre-emption purposes because tort duties and verdicts rendered thereon do not result in imposing specific standards or requirements on regulated defendants. Tort liability exerts its "regulatory" influence only indirectly, by providing market incentives for

manufacturers to invest in safety, rather than by direct governmental commands. Congress is therefore unlikely to view tort liability as posing the same potential conflict with federal safety regulations that direct state regulation involves.

This Court's pre-emption decisions have long recognized the distinction between the indirect effect of tort liability on private decision makers and direct government regulation. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 258 (1984), the Court found no inconsistency between "vest[ing] the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Mr. Silkwood to recover for injuries caused by nuclear hazards." As the Court later explained:

> The effects of *direct* regulation on the operation of federal projects are significantly more intrusive than the *incidental* regulatory effects of such an additional award provision. . . .We believe Congress may reasonably determine that *incidental regulatory pressure is acceptable, whereas direct regulatory authority is not.*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988)(emphasis added).

Justice Blackmun later described the import of these decisions, "The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory impact of the common law from positive enactments such as statutes and administrative regulations." *Cipollone, supra,* at 505 U.S. 536-37 (Blackmun, J., concurring in part, dissenting in part).

In the same vein, ATLA submits, product liability law which adds the cost of injuries to dangerous products, making safer products more attractive, are not state requirements. Because tort actions do not result in imposing specific design standards or requirements on manufacturers, they do not pose the potential for conflict with federal standards that state administrative regulations present. For this reason, Congress here intended that common law and state causes of action continue while state administrative regulations be pre-empted.

IV. THE SAVINGS CLAUSE IN THE FBSA CLEARLY INDICATES CONGRESS DID NOT INTEND TO EXPRESSLY OR IMPLIEDLY PRE-EMPT PRODUCT LIABILITY ACTIONS.

A provision added to the FBSA by the Senate committee provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability under common law or under State law.

46 U.S.C.A. § 4311(g).

The meaning of this savings clause -- or in Justice Scalia's phrase, "antipre-emption provision," *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 295 (1987)(Scalia, J., concurring) is plain. As explained by the Senate Report:

> This section is a Committee amendment and is intended to clarify that compliance with the Act or standards, regulations, or orders promulgated thereunder, does not relieve any person from liability at common law or under State law. The purpose of this section is to assure that in a product liability suit mere compliance by a manufacturer

> with the **minimum standards** promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

S. Rep. No. 92-248, reprinted in 1971 U.S.C.C.A.N. at 1352 (emphasis added).

Therefore, the Illinois court was obviously correct in concluding that the cause of action asserted in this case was not expressly pre-empted by the statute. However, in the face of that clear statement of Congressional intent, the Illinois court nonetheless found implied pre-emption.

Even if "obstacle" pre-emption can properly be applied to state tort remedies, the court erred in its application here. The Illinois court stated that Petitioners' product liability claims would conflict with Congressional intent to impose regulatory uniformity by vesting exclusive regulatory authority in the Coast Guard. 757 N.E.2d at 85. In so concluding, the court clearly overlooked the primary objective of Congress in enacting the Federal Boat Safety Act, which was ". . . to improve boating safety by requiring manufacturers to provide safer boats and boating equipment to the public . . . ." It also overlooked the clear indication that Congress did not intend the Coast Guard's regulatory authority to exclude all state authority. Congress authorized the Coast Guard to develop "minimum safety standards", 46 U.S.C. § 4302, and also specifically stated that compliance with those minimum standards "does not relieve a person from liability at common law".

On this issue, we believe that the dissent below got it right in concluding that implied pre-emption could not be found in the face of the specific wording of the statute:

> I also disagree with the result the majority reaches on the merits. My colleagues go to enormous lengths to uphold a finding of preemption when they should be doing exactly the opposite. . . .
>
> In ascertaining congressional intent, our inquiry necessarily begins with an analysis of the language of the statute. The language employed by Congress here could not be more clear. Section 4311(g) of the FBSA expressly provides:
>
> > Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g) (1994).
>
> If we are to give this provision its plain and ordinary meaning, as we must, Mercury Marine's compliance with the standard adopted by the Coast Guard, which was not to require propeller guards, clearly does not bar the common law tort claims asserted against it by Sprietsma in this case. Indeed, it is difficult to see how Congress' intention to preserve such tort claims could have been expressed any more explicitly.
>
> The Supreme Court of Texas (*Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex. 1994)) and the Missouri Court of Appeals (*Ard v. Jensen*, 996 S.W.2d 594 (Mo. App. 1999)) have reached the same conclusion on similar facts: the FBSA does not preempt common law tort claims based on failure to install propeller guards. . . .
>
> **While allowing common law tort claims to go forward may seem to create a tension with the**

> **Coast Guard's policy against propeller guards, that is a circumstance we must assume Congress considered when it adopted section 4311(g). If section 4311(g) ultimately proves unworkable when applied as written, that is a matter for Congress and not this court to remedy.**

757 N.E. 2d at 88 (emphasis added).

This Court has instructed that where Congress has expressed its intent in statutory language addressing pre-emption, a court may not look to other sources for "implied" pre-emption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992).

While there are circumstances in which the legislative language addressing pre-emption does not entirely negate the possibility of implied pre-emption, there is, at the very least, a strong inference that an express pre-emption clause forecloses implied pre-emption. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995). In this case, the provisions in the FBSA expressly dealing with pre-emption were abundantly sufficient to provide a "reliable indicium of congressional intent." *Id.* Amicus submits that the Illinois court therefore erred by engaging in a search for implied pre-emption.

V. THE FEDERAL BOAT SAFETY ACT APPLIES ONLY TO VESSELS OPERATING ON THE NAVIGABLE WATERS OF THE UNITED STATES. THEREFORE, THE PRODUCT LIABILITY CAUSE OF ACTION IN THIS CASE ARISES FROM FEDERAL MARITIME COMMON LAW, AND THUS IS NOT PRE-EMPTED BY THE STATUTORY PRECLUSION OF STATE LAWS AND REGULATIONS

The wording of the statute describing the scope of its application in Section 4301 clearly limits the provisions of the statute to vessels operating on navigable waters:

> (a) This chapter applies to a recreational vessel and associated equipment carried in the vessel on waters subject to the jurisdiction of the United States (including the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988) and, for a vessel owned in the United States, on the high seas.

Therefore, the application of the statute is concurrent with the admiralty and maritime jurisdiction of the United States.

The accident which is the basis of this suit occurred on an inlet of Dale Hollow Lake, an impoundment which is navigable between the states of Tennessee and Kentucky, and therefore a waterway subject to the jurisdiction of the United States. (If the accident occurred on a body of water which was not navigable between states or to the sea, the FSBA would not apply and thus would not pre-empt any state law or regulation.)

An accident occurring on a navigable waterway, involving a maritime activity such as the operation of a pleasure boat, falls within the scope of admiralty

jurisdiction and is therefore subject to federal maritime law. *Foremost Insurance Co. v. Richardson*, 457 U.S. 688 (1982); *Sisson v. Ruby*, 497 U.S. 358 (1990). Even though this action was filed in state court, federal maritime law must be applied to the product liability cause of action.

The product liability cause of action available to the petitioner arises under federal maritime common law. It is now beyond question that maritime common law has developed its own body of product liability law. Any doubt as to this was eliminated by this court in *East River S.S. Corp. v. TransAmerica Delaval, Inc.*, 476 U.S. 858 (1986):

> With admiralty jurisdiction comes the application substantive admiralty law . . . . Absent a relevant statute, the general maritime law, as developed by the judiciary, applies . . . . Drawn from State and Federal sources, the general maritime law is an amalgam of traditional common law rules, modifications of those rules, and newly created rules . . . . This court has developed a body of maritime tort principles, . . . and is now asked to incorporate products-liability concepts, long a part of the common law of torts, into the general maritime law . . .
>
> The Courts of Appeals sitting in admiralty overwhelmingly have adopted concepts of product liability, based both on negligence, *Sieracki v. Seas Shipping Co.*, 149 F.2d 98, 99-100 (CA3 1945), aff'd on other grounds, 328 U.S. 85, 66 S.Ct. 872, 90 L. Ed. 1099 (1946), and on strict liability, *Pan-Alaska Fisheries, Inc., v. Marine Construction and Design Co.*, 586 F.2d 1129, 1135 (CA9 1977) (adopting Restatement (Second) of Torts §402A (1965)). Indeed, the Court of Appeals for the Third Circuit previously as stated that the question of whether

> principles of strict products liability are part of maritime law "is no longer seriously contested." . .
>
> We join the Courts of Appeals in recognizing products liability, including strict liability, as part of the general maritime law. This Court's precedents relating to injuries of maritime workers long have pointed in that direction. . . . The Court's rational in those cases--that strict liability should be imposed on the party best able to protect persons from hazardous equipment--is equally applicable when the claims are based on products liability.

476 U.S. at 864-866.

Section 402A of the Restatement (Second) of Torts is now uniformly applied in maritime products liability cases. The wording of this section makes it clear that neither negligence nor any other aspect of the manufacturer's conduct is relevant to a determination of liability:

> (1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in (1) although applies
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and

> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The differences between strict liability under § 402A and negligence liability were discussed at length by the Fifth Circuit in each of its opinions in *Lewis v. Timco, Inc.*, 697 F.2d 1252 (5th Cir. 1983), reversed en banc on other grounds, 716 F. 2d 1425 (5th Cir. 1983), opinion on remand, 736 F. 2d 163 (5th Cir. 1984). In the initial panel opinion, the court correctly described the philosophy underlying strict liability under § 402A:

> As a policy matter, strict liability in tort in products cases deals with business or enterprise responsibility: 'public policy demands that the burden of accidental injuries caused by products intended for consumption be placed on those who market them, and be treated as a cost of production against which liability insurance can be obtained' Restatement (Second) of Torts § 402A, comment (1965) . . . Indeed, since the concept of 'strict liability' involves holding a defendant--a manufacturer or a distributor in the products case--answerable without a demonstration of negligence, [fn. 6. A showing of utmost care in the manufacture of a defective item is no defense to a manufacturer in a products liability case.] it is considered by many commentators to be a separate ground for a tort suit.

697 F. 2d at 1255.

The en banc opinion reversed the panel decision only as to whether the plaintiff's comparative negligence could be applied to reduce the damages awarded. Judge Politz, disagreeing with the majority on that

point, did provide further guidance on the nature of the liability imposed under 402A:

> Strict liability is based on a theory of responsibility which requires no finding of fault. The law of strict liability, applicable in some form in most American jurisdictions, is succinctly stated in Restatement (Second) of Torts, § 402A (1965). The comments to the Restatement note that 'the rule applies although [the party] has exercised all possible care.' . . . The comments further note that this action is an alternative to negligence. The elements of a strict liability action are (1) injury, (2) defect, and (3) a causal tie between the two. *Burks v. Firestone Tire & Rubber Co.*, 633 F. 2d 1152 (5th Cir. 1981).
>
> **A negligence action focuses on conduct, specifically the quality of the act causing the injury; a strict products liability action focuses on the product itself.** The moving force behind the strict products liability concept is the determination to reduce the risks defective products impose on society. The rise of strict liability and products liability actions results from the perception that the manufacturing enterprise can best carry the cost of injuries occasioned by defective products as an element of the product cost. Strict liability concerns itself with the relationship between the manufacturer and society as a whole. The relationship between specific plaintiffs and defendants is of secondary importance; it is considered subservient to the interest of the public as a whole.

716 F. 2d at 1433-1434 (emphasis added).

Therefore, on the law which should be applied to the strict liability claim made in this case, the focus of the inquiry and the plaintiff's burden of proof will not be directed toward the defendants' conduct in

designing or failing to design a guard for this outboard motor at the time it was manufactured. Instead, the focus will be on this product and whether it was unreasonably dangerous when put to a foreseeable use. Maritime products liability law will give short shrift to "consumer expectations" created by the conduct of the defendant manufacturers themselves. Feasibility, as such, may or may not even be an issue in this case, depending on facts developed in discovery which has yet to be conducted.

The question of whether the manufacturer provided adequate warning may or may not also be an issue in this case. As the Fifth Circuit stated in one of its leading products liability cases, "Any . . . product user has a right to decide whether to expose himself to the risk." *Borel v. Fiberboard Paper Products Corp.*, 193 F. 2d 1076, 1106 (5th Cir. 1973). Strict liability, including liability for failure to warn, is available in maritime actions for injury or wrongful death. *Soileau v. Nicklos Drilling Co.*, 302 F. Supp. 119 (W.D. La. 1969). See also, *Pavlides v. Galveston Yacht Basin, Inc.*, 727 F. 2d 330 (5th Cir. 1984), where the Fifth Circuit affirmed a district court finding that the boat was not unreasonably dangerous in its design or manufacturer, but reversed because the district court had failed to apply the proper standards to the manufacturers strict liability for failure to warn.

Admiralty law has frequently adopted applicable state law principles, where no governing federal statute or principle of maritime common law applied. *Just v. Chambers*, 312 U.S. 383 (1941). The maritime law clearly permits the incorporation of applicable state statutes for the purpose of determining

damages recoverable for wrongful death, where no federal statute specifying the damages is applicable. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996).

However, where established principles of maritime law exist, the rights and liabilities of the parties will be governed by maritime law principles, to the exclusion of any inconsistent state laws. For example, in *Cossick v. United Fruit Company*, 365 U.S. 731 (1961), the federal maritime law rule validating oral contracts precluded the application of a state statute of frauds. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), this court held that the admiralty common law comparative negligence rule barred the application of a state contributory negligence rule. Similarly, in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), this court held that the federal maritime rule allocating the burden of proof displaced a conflicting state rule. In *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), Cert. denied, 419 U.S. 884 (1974), the Court of Appeals held, in a case involving a passenger who fell from a pleasure boat and was injured by the propeller, that federal maritime substantive law applied to the exclusion of a state statute limiting recovery for social guests on boats, because that statute would have defeated a federal right of recovery.

Even where a state statute is adopted by federal maritime law to provide the damages recoverable for wrongful death, as would be done in this case, the substantive law determining the rights and liabilities of the parties is still to be drawn from established maritime law principles. *Calhoun v. Yamaha Motor Corp. U.S.A.*, 216 F.3rd 338 (3rd Cir. 2000)(appeal after remand).

The product liability cause of action available to the petitioner in this case should be based upon the principles of strict manufacturers liability, now fully incorporated into the maritime products liability common law as recognized in *East River*, supra. Under this analysis, the extent to which tort remedies under Illinois or Tennessee law are pre-empted by the Federal Boat Safety Act would be immaterial. The wording of Section 4306, prohibiting the adoption of state laws or regulations, does not remotely approach pre-emption of remedies afforded under federal maritime common law. To the contrary, the maritime common law remedy is clearly preserved by the anti-pre-emption provision contained in Section 4311(g).

The decision of the Coast Guard not to adopt regulations with respect to propeller guards creates a situation analogous to that presented to this court in the recent decision in *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235 (2002). In that case, the Coast Guard had not exercised its authority to adopt regulation governing workplace conditions aboard uninspected vessels, although it had authority to do so and had applied certain marine safety regulations to vessels of that type. This court held that because the Coast Guard had failed to exercise its regulatory authority over working conditions on uninspected vessels, its action in adopting limited regulations did not pre-empt the application of the workplace safety regulations of the Occupational Safety and Health Administration. In so holding, this court stated:

> Congress' use of the word "exercise" [in Section 653(b)(1) of the Occupational Safety and Health Act] makes it clear that . . . mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction. Furthermore, another federal agency's minimal exercise of some authority over certain conditions on vessels . . . does not result in complete pre-emption of OSHA jurisdiction, because the statute also makes it clear that OSHA is only pre-empted if the working conditions at issue are the particular ones 'with respect to which' another federal agency has regulated . . . .

Slip Opinion at pp. 3-4.

Applying these principles, this court should hold that the Coast Guard's decision not to exercise its regulatory authority under the Federal Boat Safety Act cannot rise to the status of "a regulation prescribed under Section 4302" of the statute, and therefore has not created any pre-emption of common law or state law under Section 4306 of the Federal Boat Safety Act.

Under established maritime law principles, the product liability remedy sought by the Petitioner should be allowed, since it is not clearly prohibited. As this court noted in *Yamaha Motor Corp. USA v. Calhoun*, 516 U.S. 199, 214, quoting from *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970): "The decision recalled that 'it better becomes the humane and liberal character of proceedings in admiralty to give rather than to withhold the remedy, when not required to withhold it be established and inflexibles.' *Id*, at 387 (quoting *The Seagull*, 21 F. Cas. 909, 910 (no. 12,578)(CC Md. 1865)."

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the judgment of the Supreme Court of Illinois and hold that the common law tort action pursued in this case is not pre-empted by the Federal Boat Safety Act.

Respectfully submitted,

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